Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED FOR REVIEW

Whether a federal appellate court has jurisdiction to entertain a petition for writ of mandamus where the district court erroneously remanded an action properly removed pursuant to Title 9 U.S.C. §205.

LIST OF PARTIES

The following companies and individuals are parties to the proceeding sought to be reviewed: Petitioners, Ocean Marine Mutual Protection and Indemnity Association, Ltd. and Robert Davis d/b/a Davis Marine Insurance Agency, and the Plaintiff/Respondent Edison Wilson.

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OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 12, 1993.

REFERENCE TO OPINIONS BELOW

The opinions below consist of: The opinion of the Court of Appeals for the Eleventh Circuit as reprinted in the Appendix, A 1. The three orders of the United States

District Court for the Southern District of Florida (Miami Division) are reprinted in the Appendix; the August 4, 1992 order (First Order) at A 2 through A 5, the October 16, 1992 order (Second Order) at A 6 through A 11, and the January 7, 1993 order (Third Order) at A 12 through A 18.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on October 12, 1993. This Petition for Writ of Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Andy Corporation of Panama was the owner of the vessel M/V TOMA; ATA Nautical Corporation, another Panamanian corporation, was manager of that vessel (hereinafter "Andy/ATA"). Plaintiff, Edison Wilson, a Nicaraguan citizen and resident (hereinafter "WILSON"), was employed by Andy/ATA on the M/V TOMA. In 1985, during that employment, WILSON was injured while off the M/V TOMA in Mexico as a result of a motorcycle accident.

Petitioner, OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., a Cayman insurance club (hereinafter "OCEAN MARINE"),

insured Andy/ATA's vessel after accepting Andy/ATA's Proposal for Membership in the insurance club and issuing a policy (hereinafter the "Policy"), subject to the Proposal and the Policy rules (hereinafter the "Policy Rules"). Petitioner, ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY (hereinafter "DAVIS"), is alleged to have placed the insurance coverage for the M/V TOMA with OCEAN MARINE for Andy/ATA.

The accident occurred during the period of coverage provided by OCEAN MARINE's Policy. WILSON brought suit against his former employer, Andy/ATA, in the United States District Court for the Southern District of Florida (hereinafter the "Injury Action"). WILSON and Andy/ATA agreed in the Injury Action to a Consent Judgment and Andy/ATA assigned all its rights against OCEAN MARINE and others related to the insurance to WILSON.

After obtaining the Consent Judgment in the Injury Action, WILSON filed this action against OCEAN MARINE and DAVIS in the Circuit Court in and for Dade County, Florida. WILSON asserts that, based on the Assignment from Andy/ATA, he is entitled to enforce Andy/ATA's rights against OCEAN MARINE and DAVIS.[1] WILSON is therefore seeking recovery from

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[1] WILSON claims OCEAN MARINE is responsible for the judgment entered in the Injury Action under the coverage afforded to Andy/ATA, his former employers, as Members of the insurance club. WILSON also alleges that DAVIS, as agent for OCEAN MARINE, wrote, sold or delivered the Policy to Andy/ATA and that DAVIS was vicariously "liable for insurance benefits in place of OCEAN MARINE."

OCEAN MARINE and DAVIS under the OCEAN MARINE Policy. WILSON's assignor, Andy/ATA, agreed when applying for membership in the insurance club, to be bound by the Policy Rules. Policy Rule 37 requires, prior to payment of *any* claims to an insured member, arbitration in London, England of any disputes or differences arising from the Policy. No arbitration has been held nor has WILSON or Andy/ATA, his assignor, ever requested or agreed to arbitration.

On June 24, 1992, DAVIS removed the underlying case, based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and 9 U.S.C. §205 (the "Convention Act"), to the United States District Court for the Southern District of Florida. On July 1, 1992, OCEAN MARINE entered a Special Appearance consenting to the removal and requesting arbitration in London under the Policy's terms.[2] On July 27, 1993, WILSON filed a motion to remand alleging that DAVIS could not remove the case because the claims against him were not subject to the arbitration agreement. Additionally, WILSON argued that only part of the case was removable, the part as to OCEAN MARINE, and that the claims against DAVIS were not removable.[3] WILSON did not argue that the removal was untimely or that there were any defects in removal procedure. On August 4, 1992, the district court

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[2] OCEAN MARINE re-entered its special appearance at the Eleventh Circuit on jurisdictional grounds and continues to appear before this Court by special appearance.

[3] The District Court rejected WILSON's arguments as lacking merit. (*See*, Second Order A 9-10).

entered an order of remand finding that the removal was untimely because it had not been filed within thirty days of service on the defendants of process in the state court action ("First Order") (A 2).

After confirming that the clerk of the court had not mailed the statutorily required certified copy of the First Order to the circuit court, Petitioners filed a motion to reconsider. The jurisdictional basis for the motion to reconsider was not disputed by WILSON. The district court accepted that it had jurisdiction and, recognizing that its First Order was based on a misreading of the applicable statutes and law, entered an Order Granting Motion for Continuance of August 4, 1992 Order of Remand (the "Second Order"), dated October 16, 1992, vacating the First Order and specifically finding that: 1) it had subject matter jurisdiction; and 2) the arguments raised in WILSON's Motion to Remand "lack merit." (A 6).

WILSON then filed a Motion for Rehearing and Suggestion of Lack of Jurisdiction. WILSON's argument in this motion was that, instantaneously upon the signing of the First Order, the district court lost jurisdiction to reconsider its First Order, regardless of whether or not the clerk had completed its statutorily required duty of notifying the circuit court of that order. The district court accepted WILSON's argument and entered the Third Order, vacating the Second Order and reinstating the First Order. (A 12).

OCEAN MARINE and DAVIS filed a petition for writ of mandamus to the Eleventh Circuit Court of Appeals which was opposed by WILSON. On March 26, 1993, the

circuit court entered an Order staying any orders of the district court and on May 10, 1993, directed the parties to file briefs on two issues: "(1) whether this action was removable under 9 U.S.C. §205, and (2) if so, whether it was properly removed." After full briefing of these issues, the circuit court on October 12, 1993 entered an Order stating:

> The petition for writ of mandamus is dismissed for want of jurisdiction to review the orders in question.
>
> Petitioners' alternative petition for writ of prohibition is dismissed for want of jurisdiction to review the orders in question.
>
> The stay we previously entered is lifted.

(A 1). Petitioners submit this application for Writ of Certiorari to review the Eleventh Circuit's ruling within 90 days from the filing of the circuit court's decision.

REASONS FOR GRANTING THIS PETITION

Long ago in *United States v. Rice*, 66 S.Ct. 835 (1946), this Court held that a district court's remand of an action removed pursuant to a special removal statute was unreviewable. Although *Rice* has not been outright overruled, its precedential value has been substantially eroded both by Congress' amendment of several of the special removal statutes and this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 96 S.Ct. 584 (1976). In addition, one federal court of appeal has simply ignored *Rice* and reviewed an order remanding a case removed under a special removal statute while other courts of

appeal have grudgingly held that they have no jurisdiction to review such orders.

The source of congressional and judicial displeasure with *Rice* is that its overbreadth leads to the frustration of congressional intent in channeling certain cases into federal courts by the enactment of special removal statutes to achieve that policy. The statute at issue here, for example, is intended to channel cases subject to the Convention into federal courts to achieve U.S. compliance with its treaty obligations and uniformity in the implementation of the Convention.

Unless mandamus is granted, the district court's admittedly erroneous First Order will go unreviewed and the petitioners will be denied their right to proceed in federal court. Moreover, Congress' intent to insure uniformity in enforcement of the Convention by channelling Convention Act cases into federal court will be severely undermined.

Congress intended that federal courts have original jurisdiction over cases brought under Title 9 U.S.C. §205.

Under the Convention, to which the United States is a signatory, and the Convention Act, the federal courts have original jurisdiction over this case and thus, this case is removable to the United States District Court. As noted by the Fifth Circuit in *McDermott International v. Lloyds Underwriters of London*, 944 F.2d 1199, 1210 (5th Cir. 1991), Congress' initial hesitancy in ratifying the Convention arose out of a fear that state courts might not enforce foreign arbitration agreements or might apply their own

arbitration laws which may be in conflict with the Convention.[4] Any such actions would violate United States' treaty obligations to enforce the provisions of the Convention. Moreover, under the reciprocity clause of the Convention, inappropriate state court rulings could well frustrate the attempts of U.S. citizens to enforce their arbitration rights in foreign jurisdictions:

> If state courts refuse to promptly enforce arbitration agreements in Convention cases, other signatory nations could cite the Convention's reciprocity clause to justify departing from the Convention in cases involving citizens of states with recalcitrant courts . . . Because the Convention only permits other countries to reciprocally abrogate Convention covenants "to the extent" that our nation does, anomalous state court Convention decisions could only be raised against our citizens . . .

Id. at 1211. These considerations mandate a departure from the traditional tendency to strictly construe removal statutes. *Id.* at 1212-13.

The district court, in its Second Order vacating the First Order of remand, recognized the importance of the presumption in favor of removal in cases involving arbitration clauses covered by the Convention:

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[4] *McDermott* raised the concern that state courts might not even be obligated to enforce the Convention:

> . . . but the only courts, "having jurisdiction under the Convention Act" are federal . . . So section 206, like the FAA's section 4, arguably confers no authority on state courts to compel arbitration. *Id.* at p.1211, n.16.

> The *McDermott* court reasoned that Congress intended to channel cases involving arbitration clauses covered by the [Convention] into the federal courts. *See id.* Congress's efforts to ensure that Convention cases be heard in federal court arise from two concerns. First, Congress was concerned that state courts hearing cases involving clauses requiring foreign arbitration might be less inclined to enforce such clauses. *Id.* If this refusal were widespread, it might induce foreign courts to retaliate by refusing to enforce the Convention in cases involving citizens to the United States. *Id.* Congress thus hoped that federal courts would better ensure reciprocal enforcement of the Convention. Second, Congress was concerned about uniformity. The goal of the Convention was to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced. *Scherk v. Alberto-Culver Company*, 94 S.Ct. 2449, 2457 (1974). A liberal removal statute fosters uniformity by limiting the number of instances in which state courts will have the opportunity to interpret the Convention and thus reducing the possibility of inconsistent interpretations.

See Second Order (A 8).

Therefore, as the district court acknowledged, the action was properly removed under the Convention Act and its remand based on the thirty-day requirement of §1446(b) was erroneous. *See also Matter of Amoco Petroleum, et al.*, 964 F.2d 706 (7th Cir. 1992) (a party may remove an arbitrable matter involving a foreign party "at any time prior to trial" pursuant to the Convention Act and without regard to the thirty-day limits set forth in the general removal statute); *Employers Insurance of Wausau v.*

Certain Underwriters, 787 F.Supp. 165 (W.D. Wis. 1992) (the Convention Act and the Foreign Sovereign Immunities Act are similar in that they are both intended to channel foreign sovereigns away from state courts and into federal court, and they both allow removal after thirty days); *Manas y Pineiro v. Chase Manhattan Bank,* 443 F.Supp. 418, 421 (S.D.N.Y. 1978) (the language: "at any time before trial" contained in the Convention Act means that a case may be removed at any time before there has been litigation on the merits); *Dale Metals Corp. v. Kiwa Chemical Industry Co.,* 442 F.Supp. 78, 81, n.1 (S.D.N.Y. 1977) (the language in the Convention Act regarding the right to removal before trial is explicit).

The district court's First Order frustrates Congress' intent to have Convention Act cases proceed in federal court. The First Order, as acknowledged by the district court in its Second Order, was clearly erroneous and should be reviewed by mandamus.

The applicability of §1447(d) to cases removable under the Convention Act has been limited by Thermtron.

At issue here is the applicability of §1447(d)'s prohibition against review where, as in this case, the action was removed pursuant to a special removal statute. In *Rice,* this Court construed §1447(d)'s predecessor to preclude review of a remand order, even though the case was removed pursuant to a special removal statute. This Court held "these provisions [governing removal procedure and remands] were intended to be applicable not only to remand orders made in the suits removed under [the general removal statutes], but to orders of remand made in cases removed under any other statutes, as

well." 66 S.Ct. at 839. *Thermtron* limited *Rice* by holding that the prohibition of review contained in §1447(d) applies only to remand orders which are within the district court's statutory authority under §1447(c), and that a remand which is based on grounds not appearing in §1447(c) is subject to review by mandamus proceedings. 96 S.Ct. at 590. *See, Royal v. State Farm Fire and Casualty Company,* 685 F.2d 125, 126 (5th Cir. 1982).

Relying on *Thermtron,* the Eleventh Circuit in *In re Federal Savings and Loan Ins. Corp.,* 837 F.2d 432 (11th Cir. 1988) (hereafter *"FSLIC"*) held that §1447(c) does not apply to cases removed pursuant to a special removal statute. In *FSLIC,* the Eleventh Circuit granted a writ of mandamus and vacated a district court's order remanding a case removed by the FSLIC pursuant to 12 U.S.C. §1730(k)(1).[5] That statute, like the Convention Act in this case, authorized the FSLIC, when acting as the receiver for the Federal Savings and Loan Association, to remove a state court action to a United States district court. The district court in *FSLIC* held that the FSLIC improperly removed the case for failure to follow §1446(b)'s requirement of consent of all defendants to removal. Similarly, in this case, the district court applied the thirty day filing

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[5] This statute has since been amended by Congress to allow for appeals of district court's remand orders. *See* §501(1)(3) of the Financial Institutions Reform, Recovery and Enforcement Act, PL No. 101-73, 103 Stat. 183 (codified as amended 12 U.S.C. §§1821 et seq.) This amendment further shows Congress' displeasure with the review preclusion of remand orders in cases removed pursuant to special removal statutes. Unfortunately, Congress has thus far dealt with this problem in a piecemeal fashion.

time requirement of §1446(b) to a removal under the Convention Act. Because the removal in *FSLIC* was made pursuant to a special removal statute, the Eleventh Circuit found that the remand was necessarily based on reasons outside §1447(c) and was therefore not insulated from review by §1447(d). *Id.* at 436, citing *Thermtron*, 96 S.Ct. at 592-93. Since the removal in this case was also made pursuant to a special removal statute, §1447(d)'s non-reviewability provision is inapplicable according to *FSLIC*. Moreover, in *FSLIC*, the district court specifically remanded pursuant to §1447(c). Here, the district court did not even refer to §1447(c) in its First Order of remand. Therefore, notwithstanding *FSLIC's* conflict with *Rice*, the First Order of remand in this case falls within the *Thermtron* exception to review preclusion.

FSLIC is consistent with other circuit court cases which have allowed federal courts to review remand orders in cases removed pursuant to special removal statutes. *See e.g. McDermott*, 944 F.2d at 1212 (a remand order of a case removed pursuant to Title 9 U.S.C. §205 was outside the scope of §1447(c)); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (review by mandamus was appropriate where the district court's remand order lacked statutory basis and was clearly contrary to congressional policy as expressed in the Westfall Act); *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) (a removal effectuated to the bankruptcy court under 28 U.S.C. §1478(a) is a different type of removal from that contained in the general framework of 28 U.S.C. §§1441-1447; therefore, the provisions of §1447(d) were inapplicable); *Massachusetts v. V & M Management, Inc.*, 929 F.2d 830 (1st Cir. 1991) (in action under federal and state housing statutes, a remand

order not issued pursuant to §1447(c) was reviewable); *In re Savers Federal Savings & Loan Assoc.*, 872 F.2d 963, 965 (11th Cir. 1989) (relying on its decision in *FSLIC*, the Eleventh Circuit held that an order remanding a properly removed action was subject to a writ of mandamus).

Several circuits, however, have criticized the Eleventh Circuit's opinion in *FSLIC*.[6] *See In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3rd Cir. 1991);[7] *In re*

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[6] Despite its opinion approving of *FSLIC* in *In re Savers*, 872 F.2d at 965, the Eleventh Circuit *In re Ocean Marine Mutual Protection and Indemnity Association, Ltd., et al.*, 3 F.3d 353, 356 n.4 (11th Cir. 1993) recently acknowledged the cases criticizing its decision in *FSLIC* and stated in a footnote that mandamus is only appropriate to review remand orders in actions removed pursuant to 12 U.S.C. §1730(k)(1) (1988):

> We have previously stated that "[s]ection 1447(c)'s application is . . . limited to cases removed from State Court pursuant to §1441(a)." . . . We made this statement in a case removed under 12 U.S.C. §1730(k)(1) (1988), which authorizes the FSLIC to remove to federal court when acting as the receiver of a federal savings and loan association; it is dictum as to cases removed under other statutes . . .

This holding was dictum to the issues before the court in *Ocean Marine*. It improperly and arbitrarily treats litigants under special removal statutes differently and should not be followed here.

[7] In *TMI*, the district court remanded a case on the finding that it lacked subject matter jurisdiction. On appeal, the Third Circuit thoroughly reviewed the history of §1447(d) and held that it had the authority to review the district court's remand order. Although the district court specifically remanded pursuant to §1447(c), the Third Circuit held that the district court's decision was "not the type routinely and regularly made pursuant to §1447(c)" and that it was "not the type of federal subject matter jurisdictional decision intended to be governed

Federal Savings and Loan Insurance Corp., 881 F.2d 564 (8th Cir. 1989); *Federal Savings & Loan Insurance Corp. v. Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988). The Ninth Circuit in *Frumenti* opines that the decision in *FSLIC* is in conflict with *Rice*. The *Frumenti* Court, however, acknowledges that *Rice's* holding has been narrowed by *Thermtron*:

> *Thermtron* creates an exception to §1447(d)'s general review preclusion only for remand orders that are not based on jurisdictional grounds.

Id. at 670. Since the remand in *Frumenti* was expressly based on jurisdictional grounds, *Thermtron* was of no avail. *Id.*[8] Here, however, the remand was not based on

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by the terms, or policy underlying §1447(c)." *Id.* at 844 and 845. Therefore, although the *TMI* Court criticizes the Eleventh Circuit decision in *FSLIC*, it nonetheless concludes that it had the authority to review a district court's remand order.

[8] Additionally, other cases have avoided the effect of §1447(d) where the remand was not made on jurisdictional grounds. *See e.g., Maniar v. F.D.I.C.*, 979 F.2d 782, 784 (9th Cir. 1992) (the appeal of a remand order in a case removable under the FDIC removal statute was permitted and the order vacated); *Air-Shields, Inc. v. Fullan*, 891 F.2d 63 (3d Cir. 1989) (petition for writ of mandamus was granted directing the court to vacate a remand order based on procedural defects not contemplated by §1447(c)); *Clorox Company v. United States District Court*, 779 F.2d 517 (9th Cir. 1985) and *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984) (under what has become known as the Clorox/Pelleport doctrine, a district court's remand order can be reviewed if based on a prior determination of a substantive issue of law apart from any jurisdictional issue); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982) (remand order was subject to review based on the failure of the removing party to comply with a local rule of the district court.)

jurisdictional grounds and therefore, the *Thermtron* exception to review preclusion controls.

The district court's remand order does not fall under §1447(c).

§1447(c) deals with procedure after removal and specifically provides:

> A motion to remand the case *on the basis of any defect in removal procedure* must be made within thirty days after the filing of the notice of removal under §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. [Emphasis supplied.]

It is undisputed that the district court did not remand for lack of subject matter jurisdiction. The question is therefore whether the plaintiff sought to remand the case on the basis of a "defect in removal procedure". As is evident from the plaintiff's motion to remand and memorandum of law in support, no defects in the removal procedure were ever raised.

Admittedly, the district court's First Order was not based on those grounds raised in plaintiff's motion to remand:

> The Court also finds that the contentions offered in support of Plaintiff's Motion for Remand lack merit.

See Second Order (A 9). Rather, the district court, sua sponte, held that the thirty day requirement of §1446(b)

was applicable to removal under the Convention Act.[9] The district court later held that its First Order of remand was wrong. *See* Second Order (A 11). The fact that the First Order remanded on erroneous procedural grounds should have no bearing on the applicability of §1447(c). If a district court's erroneous application of the removal statute is binding, this Court's decision in *Thermtron* would be nullified. The intent of *Thermtron* is to determine whether a district court's remand of a case is outside of its statutory authority; if a court erroneously claims it has statutory authority to enter a remand order, that decision should not go unreviewed under *Thermtron*. Since this case was not remanded pursuant to §1447(c), mandamus is appropriate to review and vacate the district court's First Order of remand.

The conflict among the circuit courts must be resolved.

Petitioners submit that mandamus should issue to review the district court's First Order of remand under *Thermtron*. Petitioners recognize, however, that the issue of whether cases removed under special removal statutes fall within the *Thermtron* exception to review preclusion, is presently unresolved. Specifically, this Court has not rendered any decisions regarding the reviewability of remand orders not based on jurisdictional grounds and

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[9] The procedural defect, even if correct, was waived by WILSON's failure to assert it within thirty (30) days of the filing of the Notice of Removal. *Maniar*, 979 F.2d at 784-5. Also, it could not have been raised by the District Court, *sua sponte*, more than thirty (30) days after the removal. *Id.*

where removal was authorized by a special removal statute. As a result, the circuit courts are in constant conflict and disarray over which remand orders are reviewable by mandamus or otherwise. As noted by the Ninth Circuit in *Frumenti,* the decision to not review remand orders involving special removal statutes is inconsistent with Congress' intent to confer federal jurisdiction. 857 F.2d at 670. The Court noted that although Congress' amendment of the special removal statute in *Rice* "undoubtedly evidenced some displeasure with *Rice,*" the *Rice* decision was nonetheless controlling where a remand was based on jurisdictional grounds. The *Frumenti* Court concluded: "Congress and the Supreme Court may be in a position to respond to the FSLIC's concerns; we are not." *Id.* This Court must recognize the conflict among the circuits and should finally settle this important question of federal law. This case presents an appropriate vehicle for such a decision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to consider and determine that the federal appellate courts have jurisdiction to review by mandamus district court orders erroneously remanding actions properly removed pursuant to Title 9 U.S.C. §205.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4145

(Filed Oct. 12, 1993)

IN RE:

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners.

On Petition for Writ of Mandamus or
on Petition for Writ of Prohibition to the
United States District Court for the
Southern District of Florida

Before EDMONDSON, COX and CARNES, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus is dismissed for want of jurisdiction to review the orders in question.

Petitioners' alternative petition for writ of prohibition is dismissed for want of jurisdiction to review the orders in question.

The stay we previously entered is lifted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-1505-CIV-NESBITT

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendant.

_____/

ORDER OF REMAND

(Filed Aug. 4, 1992)

This Cause comes before the Court upon Plaintiff's motion for remand. Defendant Robert Davis d/b/a Davis Marine Insurance Agency ("Davis") filed a notice of removal on June 25, 1992. Defendant Ocean Marine Mutual Protection and Indemnity Association, Ltd. ("Ocean Marine") subsequently entered a special appearance for the purpose of consenting to the removal on July 2, 1992.

Davis removed the case pursuant to 9 U.S.C. § 205. That section allows removal of an action that relates to an arbitration agreement or award that falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1]. The section allows removal at "any

[1] Section 205 provides specifically that:
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration

time before trial" and thus appears to eliminate the requirement that the petition for removal be filed within thirty days after the defendant receives a copy of the initial pleading through service or, if the case stated by the initial pleading is not removable, after the case becomes removable. *See* 28 U.S.C. § 1446(b).

A closer examination, however, reveals that section 205 retains the thirty day requirement set out in 28 U.S.C. § 1446(b). Section 1446(b) permits the removal of a case after trial if the case was not removable before trial, but became so after trial commenced. The Court finds that Congress intended the language in section 205 permitting removal to "any time before trial" to preclude removal after trial – not to have repeal the thirty day requirement. This intent is evidenced by the following passage from section 205:

> The procedure for removal of causes otherwise provided by law shall apply, *except that the*

> agreement or award falling under the Convention (on the Recognition and Enforcement of Arbitral Awards), the defendants or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district to which it is removed.

9 U.S.C. § 205 (1992).

> *ground for removal provided in this section need not appear on the face of the complaint but may be provided in the petition for removal.*

28 U.S.C. § 205 (emphasis added). The exception clause in the above language indicates that Congress was explicit about those aspects of the general removal procedure in section 1446 that it did not wish to apply to cases removed pursuant to section 205. The fact that Congress failed to explicitly include reference to the thirty day requirement in this exception clause indicates that Congress intended to retain the requirement for section 205 removals[2].

The removal petition filed by Davis in the present case does not satisfy the thirty day requirement. As noted above, a defendant must file a removal petition within thirty days after receipt of a copy of the initial pleading. In the present case, Davis received a copy of the summons and complaint on March 4, 1992, but did not file its notice of removal until June 25, 1992 – well beyond the thirty day period. Accordingly, it is hereby

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[2] The Court is aware that one court in another jurisdiction has taken an opposing view. In *Dale Metals Corp. v. Kiwa Chem. Ind. Co., Ltd.*, 442 F.Supp. 78, 81 n.1 (S.D.N.Y. 1977), the United States District Court for the Southern District of New York held that "the notion that the time provision of 28 U.S.C. § 1446(b) applies is totally without merit." The court, however, provided no analysis in support of this conclusion beyond a mere citation to the language in section 205 permitting removal at any time before trial. As the discussion above indicates, a more careful analysis reveals that this language was *not* intended to eliminate the section 1446(b)'s thirty day requirement. Accordingly, this Court must respectfully part company with the Southern District of New York on this issue.

ORDERED AND ADJUDGED that the above-styled cause is remanded to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of August 1992.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

copies provided:

counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendants.

CASE NO. 92-1505-CIV-NESBITT

ORDER GRANTING MOTION FOR CONTINUANCE OF AUGUST 4, 1992 ORDER OF REMAND

(Filed Oct. 19, 1992)

This Cause comes before the Court upon Defendant Robert Davis d/b/a Robert Davis Marine Insurance Agency's ("Davis") Motion for Reconsideration of the Court's Order issued on August 4, 1992 remanding the case to state court. Davis filed a notice of removal on June 25, 1992. Defendant Ocean Marine Mutual Protection and Indemnity Association, Ltd. ("Ocean Marine") subsequently entered a special appearance on July 2, 1992 for the purpose of consenting to the removal. On August 4, 1992, the Court issued an Order remanding the case to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Davis responded to this Order with the instant motion for reconsideration. This motion has now been fully briefed and is ripe for disposition.

BACKGROUND

Davis removed the case pursuant to 9 U.S.C. § 205. That section provides that:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention (on the Recognition and Enforcement of Arbitral Awards), the defendants or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district to which it is removed.

9 U.S.C. § 205 (1992). In its Order of Remand, the Court determined that the phrase "any time before trial" simply precludes removal after trial has commenced and does not eliminate the requirement that the notice of removal be filed within thirty days after the case becomes removable. This determination was based on the fact that the exception clause in section 205 fails to include explicit reference to the thirty day requirement. This Court reasoned that this clause indicates that Congress was explicit about those aspects of the general removal procedure from which it intended to exempt section 205 removals and concluded that Congress's failure to include the

thirty day rule among those requirements indicates an intent to retain the rule.

Defendant has brought to the Court's attention a recent Fifth Circuit decision, *McDermott v. Lloyd's of London*, 944 F.2d 1199 (5th Cir. 1991), which it asserts controls the issue of whether a section 205 must comply with the thirty day limit in the general removal statute. 28 U.S.C. § 1446(b). The *McDermott* court reasoned that Congress intended to channel cases involving arbitration clauses covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") into the federal courts. *See id.* Congress's effort to ensure that Convention cases be heard in federal court arose from two concerns. First, Congress was concerned that state courts hearing cases involving clauses requiring foreign arbitration might be less inclined to enforce such clauses. *Id.* If this refusal were widespread, it might induce foreign courts to retaliate by refusing to enforce the Convention in cases involving citizens of the United States. *Id.* Congress thus hoped that federal courts would better ensure reciprocal enforcement of the Convention. Second, Congress was concerned about uniformity. The goal of the Convention was to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced. *Scherk v. Alberto-Culver Co.*, 94 S.Ct. 2449, 2457 (1974). A liberal removal statutes fosters uniformity by limiting the number of instances in which state courts will have the opportunity to interpret the Convention and thus reducing the possibility of inconsistent interpretations.

Plaintiff does not address any of the preceding analysis. Instead, Plaintiff relies on *In re Savers Federal Savings*

& Loan Association, 872 F.2d 963 (11th Cir. 1989). In *In re Savers*, the Eleventh Circuit held that a state case against the Federal Savings and Loan Insurance Corporation did not cease to be an "action from a State court" within the meaning of 12 U.S.C. § 1730(k)(1)(C), where there had been a final judgment by a state trial court, but where the period for appeal had not yet lapsed. In support of its holding, the court cited 12 U.S.C. § 632, the Federal Reserve Bank removal statute. The court asserted that, if Congress had intended 12 U.S.C. § 1730(k)(1)(C) to preclude removal after issuance of a final judgment in state court, it could have adopted the language in 12 U.S.C. § 632 requiring removal be made "at any time before trial". The court thus found that the quoted language precludes removal after trial, but nowhere suggested that this language does not also eliminate the thirty day requirement. Accordingly, the Court finds that *In re Savers* has no bearing on the issue before this Court.

The Court also finds that the contentions offered in support of Plaintiff's Motion for Remand lack merit. Plaintiff originally sought remand on the ground that his claims against Davis are unrelated to the arbitration clause on which removal is based. Plaintiff obtained a consent judgment against the owners of the vessel on which he was injured and was assigned their rights against Ocean Marine – the insurer of the vessel. The contract between these owners and Ocean Marine includes the arbitration clause on which removal was premised. Plaintiff contends that Davis – as the agent that procured the insurance coverage for Ocean Marine – is therefore not a party to the contract and that his action against Davis is not related to an arbitration agreement

covered by the Convention. Plaintiff further contends that section 205 does not authorize the removal of joined claims.

The record does not support Plaintiff's position. Plaintiff's Complaint seeks recovery from Davis as an agent of Ocean Marine under section 626.901 of the Florida Statutes. That section imposes vicarious liability upon the in-state agent or any insurance company not authorized to transact business in the state, for payments which the insurance company was obligated to make, but failed to make. The Complaint also seeks damages for Davis's alleged failure to place the insured with a reliable insurance company.

The viability of these claims against Davis may turn on whether Plaintiff prevails on his claims against Ocean Marine. Davis cannot be vicariously liable for Ocean Marine's failure to honor its obligation unless Ocean Marine is found to have had such an obligation. Further, Davis cannot have placed Plaintiff with an unreliable insurer unless Ocean Marine is found to have been unreliable. Whether Ocean Marine failed to honor an obligation to Plaintiff will likely have a substantial bearing on whether Ocean Marine is found to be unreliable. As a consequence, the viability of Plaintiff's claims against Davis may turn on the outcome of the arbitration proceedings involving Ocean Marine. The arbitration clause at issue may determine the forum in which these proceedings occur. On this basis, the Court finds that, for purposes of section 205, Plaintiff's claims against Davis relate to the agreement to arbitrate in the contract involving Ocean Marine.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Davis's Motion for Reconsideration is GRANTED. The Court's Order of August 4, 1992 remanding the case to state court is VACATED and Plaintiff's Motion for Remand is DENIED. The case will proceed before this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of October 1992.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-1505-CIV-NESBITT

(Filed Jan. 12, 1993)

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendant.

_____/

This cause comes before the Court upon Plaintiff Edison Wilson's Motion for Rehearing and Suggestion for Lack of Jurisdiction. The motion requests that this Court vacate its Order of October 16, 1992, in which the Court reconsidered and vacated its earlier order remanding the case to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Plaintiff contends that once a federal district court has entered an order of remand, the court never has jurisdiction to reconsider that order.

28 U.S.C. § 1447(d) precludes review of an order of remand "on appeal or otherwise"[1]. In *Harris v. Blue Cross/*

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[1] Section 1447(d) provides that:
An order remanding a case to the State court from which it was removed is not reviewable on appeal or

Blue Shield of Alabama, Inc., 951 F.2d 325, 330 (11th Cir. 1992), the Eleventh Circuit held that the quoted phrase covers reconsideration by the district court that entered the order. The *Harris* court stated that:

> [T]here is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it do so. Both are foreclosed; nothing can be more inclusive than the phrase "on appeal or otherwise" [in § 1447(d)]. The district court has one shot, right or wrong.

Id. at 330 (quoting *in re La Providencia Development Corp.*, 406 F.2d 251 (1st Cir. 1969)).

Defendants, however, contend that a federal district court has jurisdiction to reconsider its order of remand before the clerk of the court mails a certified copy of the order to the state court. Defendants assert that the Eleventh Circuit did not address this precise issue in *Harris*. In *Harris*, the clerk had already mailed a certified copy of the district court's remand order at the time that the district court reconsidered that order. Accordingly, the Court agrees that *Harris* did not address the issue that confronts the Court in the instant case.

The Court also notes that there is significant authority supporting Defendants' position. In *Cook v. J.C. Penney Co., Inc.*, 558 F.Supp. 78, 79 (N.D.Iowa 1983), for instance,

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otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable on appeal or otherwise.

the United States District Court for the Northern District of Iowa stated that:

> [t]he federal court is not divested of jurisdiction to reconsider or vacate the order of remand until the order of remand has been entered and a certified copy of the order has been mailed to the clerk of the state court . . . Normally, a certified copy should have been mailed to the clerk of the state court on the same date. However, due to a mistake in the Federal Clerk of Court's office, as of this date, no such copy has been sent. Thus, this court has not been divested of jurisdiction and may reconsider the order of remand.

Several prominent treatises also endorse this rule. 1A Jeffrey C. Moore et al., Moore's Federal Practice ¶ 0.169[2.---1] (2d Ed. 1992) ("Although the district court's remand order of a non-§1443 action is not reviewable, this does not mean it is instantly irrevocable. Under the prior statute, despite strong language to the effect that when district court orders remanded 'such remand shall be immediately carried into execution,' it was held that this did not deprive the district court of jurisdiction. This meant that steps were taken promptly to carry the remand into effect, but until these steps were taken the district court had power to vacate its order. This is true under the present statute since it does not command immediate execution of the remand order. But the entry of the order of remand and the mailing of a certified copy to the clerk of the state court completely divests the federal court of jurisdiction so that it is powerless to vacate the order of remand."); Charles A. Wright, et al., 14A Federal Practice and Procedure § 3739 (2d Ed. 1985)

("An order of remand ends the jurisdiction of the federal court. The court is required to mail a certified copy of the order to the clerk of the state court, and *upon the state court's receipt of this copy,* the federal court is without power to vacate the order to remand, even if it is persuaded that the order was erroneous." (emphasis added)).

A rule permitting the Court to exercise jurisdiction to reconsider its order of remand would create two related problems, however. First, the rule would condition the existence of jurisdiction on a ministerial act to be performed by the clerk. *The clerk,* not the court, would thus have the power to deprive the court of jurisdiction. *See Van Ryn v. Korean Air Lines,* 640 F.Supp. 284 (C.D.Cal. 1985) ("Logic . . . indicates that it should be the action of a court (entering an order of remand) rather than the action of a clerk (mailing a certified copy of the order) that should determine the vesting of jurisdiction.").

Second, the rule would be inconsistent with the purpose underlying section 1447(d) – the statute prohibiting review of orders of remand. That section provides that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

The Court in *La Providencia* aptly summarized the purpose of this bar against review of remand orders when it stated that:

> Removal . . . is a privilege to be strictly construed . . . and the state proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of the principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court.

406 F.2d at 252.

At first blush, allowing the district court to reconsider an order of remand before the clerk mails a certified copy of the order to state court appears to be consistent with this purpose. If the clerk never mails a certified copy of the order of remand, then the state court will never have received official word that the case was remanded. The state court will therefore not reassert jurisdiction of the matter and comity will not be upset by reconsideration.

A different picture emerges if the clerk inadvertently mails a copy of the order of remand *after* the court issued an order vacating the order of remand, however. Clearly the court had jurisdiction to reconsider the order of remand before the clerk mailed the order. What effect does the clerk's subsequent act of mailing the order have on the court's jurisdiction? If the clerk's act has no effect on the court's jurisdiction, then the act has no effect on status of the court's order vacating remand. In this situation, however, the state court will first receive a certified copy of the court's order remanding the case and later receive a copy of the court's order vacating the order of remand. In the interim between receipt of these two orders the state court will likely reassert its jurisdiction

over the case and recommence the proceedings. The case will thus "richochet" back and forth between state and federal court – creating all of the risks that Congress intended section 1447(d) to prevent. These risks include the risk that judicial resources will be wasted and the risk that friction will arise between the state and federal systems.

For instance, proceedings that the state court initiates after receiving a copy of the order of remand will consume the time and resources of the state court. The proceedings cannot be valid, however, because the state court lacks subject matter jurisdiction over the case at the time of the proceedings. The proceedings will thus represent a needless expenditure of the state's judicial resources; an expenditure that would not have occurred but for a clerical error in federal court. Results of this kind erode comity between the state and federal systems.

Such results will be less likely to occur if the clerk's act of mailing a certified copy of the order of remand retroactively deprives the federal district court of the jurisdiction to reconsider its order of remand. Under these circumstances, the clerk's act would invalidate the court's order vacating remand. As a consequence, state proceedings commenced after receipt of an order of remand would remain valid. Upon receiving a certified copy of an order of remand, a state court could proceed with the case without fear that its efforts would be wasted.

While this rule would minimize the risk to state-federal comity, the rule would permit a ministerial mistake of the court clerk to deprive the court of jurisdiction

and to invalidate the order of an Article III judge. As noted above, this result defies logic. The Court does not believe that Congress intended this result when it drafted section 1447(d).

The Court adopts the only rule that avoids this quandary – the rule urged by Plaintiff. Accordingly, the Court finds that it does not have jurisdiction to reconsider an order of remand once that order has been issued, regardless of whether or not the clerk has mailed a certified copy of the order to the state court[2]. This rule is fully consistent with the Eleventh Circuit's decision in *Harris*, under which a district court has "one shot and one shot only" with respect to remand. 951 F.2d at 330.

In accordance with the rule adopted by the Court, it is hereby

ORDERED and ADJUDGED that the Court's Order of October 16, 1992 in VACATED. It is further ORDERED and ADJUDGED that the Court's Order of Remand of August 4, 1992 is reinstated in full force and effect.

DONE and ORDERED, in chambers, Miami, Florida, this 7th day of January 1993.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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[2] The Court does not intend to suggest that it lacks jurisdiction to reconsider orders of remand issued pursuant to 28 U.S.C. § 1443. Congress explicitly conferred such jurisdiction in 28 U.S.C. § 1447(d).

No. 93-1117

Supreme Court, U.S.
FILED
FEB - 7 1994

In The

Supreme Court Of The United States

October Term 1993

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a federal appellate court review a district court order which finds a case was untimely removed under 28 U.S.C. § 1446(b), where the case was removed pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205?

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No. 93-1117

In The

Supreme Court Of The United States

October Term 1993

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Edison Wilson respectfully requests this Court to decline to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on October 12, 1993.

CITATIONS OF OPINIONS BELOW

Petitioners have included all the opinions below in this case in their appendix. However, the Eleventh Circuit Court of Appeals only wrote a brief order in the case now before this Court. The opinion of the Eleventh Circuit on the issues now presented was written in full in a related case. *In re Ocean Marine Mut. Protection and Indem. Ass'n*, 3 F.3d 353 (11th Cir. 1993)[hereinafter *Deras*]. For the Court's convenience, that opinion is reprinted in the Appendix to this brief.

STATEMENT OF THE CASE[1/]

The underlying action. Edison Wilson was a seaman who was severely injured in an accident while returning to his ship, the M/V TOMA. Andy Corp. and ATA Nautical Corp. ("Andy/ATA") owned the vessel. Ocean Marine Mutual Protection and Indemnity Association Ltd. ("Ocean Marine") provided coverage to Andy/ATA and the M/V TOMA. It refused to defend or settle the claim. Wilson obtained a consent judgment against Andy/ATA and the vessel for $275,000. As part of the consent judgment/settlement agreement, Andy/ATA assigned its rights against Ocean Marine and others to Wilson. Ocean Marine refused to pay the judgment.

This case. Wilson then filed this action against Ocean Marine and Davis, the agent who had procured insurance coverage for Andy/ATA. Wilson filed the action in state court.

The claims against Ocean Marine arose out of the insurance agreement between Andy/ATA and Ocean Marine. That agreement contained an international arbitration provision which

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1/ Plaintiff/Respondent Edison Wilson will be referred to as he stands in this Court and by name. Petitioners/Defendants Ocean Marine Mutual Protection and Indemnity Association, Ltd. and Robert Davis d/b/a Davis Marine Insurance Agency will be referred to as they stand in this Court and as Ocean Marine and Davis. Emphasis is by counsel unless otherwise noted.

states:

> If any differences or disputes shall arise *between a member and the Association* out of or in connection with these Rules or any contract *between them* or as to the rights and obligations of the Association or the member thereunder or in connection therewith such differences or dispute shall in the first instance be referred to and adjudicated upon by the Directors. . . .
>
> If the member concerned in such differences or disputes does not accept the decision of the Directors or if the Directors shall fail to make any decision within three months of the reference to them of the difference or the dispute, it shall be referred to arbitration in London . . . .

(Emphasis added).

Davis, a Florida insurance agent, was not a party to this agreement between Ocean Marine [the Association] and Andy/ATA [the member]. The claims against Davis, therefore, did *not* arise out of the insurance contract. Instead, Wilson, as Andy/ATA's assignee, sued Davis for negligence in failing to obtain adequate coverage for Andy/ATA and in selecting an insurance company which he knew or should have known did not pay its claims.[2/]

The removal. About four months after he was served, Davis filed a notice of removal to the United States District Court for the Southern District of Florida. Ocean Marine filed a

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2/ In their petition at 3-4, Ocean Marine and Davis claim that Wilson seeks recovery from Davis "under the OCEAN MARINE Policy." As explained above, that is simply not the case. *See also Deras*, 3 F.3d at 354 ("the claims against Davis . . . allege negligence for failure to obtain adequate insurance coverage.").

special appearance for the limited purpose of consenting to removal. Davis claimed that removal was proper under 9 U.S.C. § 201 *et seq.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 28 U.S.C. § 1441(c).[3/]

Wilson moved to remand within 30 days of removal.[4/] He argued that Davis was not entitled to remove the action against him. Davis could not invoke 9 U.S.C. § 205 because he had no arbitration agreement with Andy/ATA and § 205 does not authorize removal of joined claims. Nor could Davis rely on 28 U.S.C. § 1441(c) because the claims against him are not separate and independent from the claims against Ocean Marine.

Shortly after it received Wilson's motion, the court granted it. It did not address the grounds Wilson had raised. Instead, the court ruled that the requirement of 28 U.S.C. § 1446(b) that cases be removed within 30 days of service applied to cases removed under 9 U.S.C. § 205. The court remanded the case because Davis had not removed for almost four months.

Within ten days, Davis and Ocean Marine moved to reconsider the remand order. They claimed the district court could reconsider the remand order because the district court clerk had not yet transmitted the certified copy of remand to the state court pursuant to 28 U.S.C. § 1447(c).

The district court granted rehearing. The court rejected its previous determination that § 205 incorporated the 30-day requirement. It then rejected Wilson's arguments on the merits. It found that the claims against Davis were sufficiently related to the arbitration clause to fall within § 205, even though Davis was

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3/ Although the notice of removal cites only 9 U.S.C. § 205, Davis invoked 28 U.S.C. § 1441(c) as well in his memorandum in support of removal.

4/ Although the district court did not grant the motion on procedural grounds within the 30-day period, it was free to do so because the motion was filed within the time limit. *Compare* Fed.R.Civ.P. 59(d).

not a party to the arbitration agreement. The court did not address Wilson's arguments under 28 U.S.C. § 1441(c).

Wilson moved for rehearing. He suggested that the court did not have jurisdiction to grant Davis' and Ocean Marine's motion for rehearing in the first place. Once the court issued the remand order, it had no jurisdiction to reconsider its order, regardless of the status of the clerk's certificate, a ministerial act unrelated to the court's jurisdiction. The district court granted that motion. It vacated its first rehearing order and reinstated the original remand order. Davis and Ocean Marine filed a petition for writ of mandamus in the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit dismissed the petition in a brief order which addressed neither the facts nor the law. In *Deras*, another case which the Eleventh Circuit reviewed at the same time and which also involved Ocean Marine, Davis, the same arbitration clause, the same removal issues, but a different injured plaintiff named Deras, the court wrote an opinion which explained why it found that the remand orders at issue in both *Wilson* and *Deras* could not be reviewed by the district court, the circuit court "or otherwise."

SUMMARY OF ARGUMENT

The district court remanded this case to state court on procedural grounds as authorized by 28 U.S.C. § 1447(c). Pursuant to 28 U.S.C. § 1447(d), remands on procedural grounds are not reviewable by either the district court on rehearing or by the appellate court, on appeal or otherwise. This rule barring review applies even if the remand was wrong.

Ocean Marine and Davis have attempted to get around these rules by claiming that § 1447(d) does not limit review of remand orders entered pursuant to the special removal statute of the Convention on the Recognition of Foreign Arbitral Awards. There is nothing in the Convention to indicate such intent. And

this Court has long held that the limitation on review of remand orders applies even to cases removed under special removal statutes, unless Congress has specifically stated otherwise. Some special removal statutes contain statements by Congress that remand orders under those statutes shall be reviewable. The Convention does not.

Ocean Marine and Davis claim that this Court should take jurisdiction of this case because there is a conflict in the circuits on the issue of whether § 1447(d) precludes review of orders entered pursuant to special removal statutes. There is no such conflict. The circuits are all in accord: if the special removal statute contains no statement of Congressional intent to permit review, then § 1447(d) applies and no review is permitted. The two primary cases on which Ocean Marine and Davis rely have each been criticized and revised by later opinions of the same circuits that wrote them.

Finally, this entire petition is premised on the assumption that Davis had an absolute right of removal. That assumption is incorrect. Davis, the only party who filed a notice of removal, improperly relied on the special removal statute because he was not a party to an international arbitration agreement and the claim against him did not arise out of such an agreement. Nor does Wilson concede that Ocean Marine could have removed the case either.

In sum, this case was decided consistently with every other circuit that addressed an analogous issue. The Eleventh Circuit was correct; it had no jurisdiction to review this case. This Court should deny the petition for writ of certiorari.

ARGUMENT
REASONS FOR DENYING THE WRIT

This case is a classic example of the reason for the general rule that remand orders are not reviewable. The purpose of the prohibition against review of such orders is to avoid delay in addressing the merits of a case because of prolonged litigation over the forum. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351, 96 S.Ct. 584, 593 (1976); *United States v. Rice*, 327 U.S. 742, 751-52, 66 S.Ct. 835, 839 (1946); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 396 n.9 (5th Cir. 1981). That is precisely what is happening here. This Court should deny the writ of certiorari. The Eleventh Circuit correctly ruled that it had no jurisdiction to review the district court orders relating to the remand of this case to state court. This ruling is consistent with the rulings of other circuits. Moreover, contrary to Ocean Marine's and Davis' contention, Davis did not properly remove this case.

The § 1447(d) prohibition on review of remand orders applies here -- "The horse before the cart."

Review of all remand orders is governed by 28 U.S.C. § 1447, regardless of the basis for removal. See argument *infra* at 11-13. Thus, an understanding of the Eleventh Circuit's decision should begin and end with review of that statute and not, as Ocean Marine and Davis have done, with review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The basis for the general rule that prohibits review of remand orders is 28 U.S.C. § 1447(d). It provides:

> An order remanding a case to the State court from which it was removed is not reviewable *on appeal or otherwise*, except that an order remanding a case to the State court from which it

> was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

This section bars reconsideration of a remand order by the district court on rehearing and by the appellate court through appeal or writ of mandamus. *See Thermtron*, 423 U.S. 336, 96 S.Ct. 584.[5/] Significantly, review is foreclosed even if the district court erroneously remanded the case. *Id.* at 343, 96 S.Ct. at 589. Thus, Davis' and Ocean Marine's emphasis on the alleged erroneous reasoning behind the district court's first remand order is misplaced. The threshold question is whether § 1447(d) applies to this order. If it does, it is unreviewable -- right or wrong. *See In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir. 1992)(court will not reach question of whether remand was erroneous because unreviewable under § 1447(d)).

By its terms, § 1447(d) appears to proscribe any review of remand orders. However, in *Thermtron*, this Court held that 28 U.S.C. § 1447(c) only prohibited review of remand orders issued pursuant to § 1447(d). 423 U.S. at 346, 96 S.Ct. at 590.

> Remands based on considerations outside § 1447(c), *e.g.*, a crowded docket, were an exception to § 1447(d) and remained subject to review on mandamus.

Deras, 3 F.3d at 355 (citing *Thermtron*, 423 U.S. at 344-45, 96 S.Ct. at 590).

Thus, this Court must first determine whether the original remand order in this case was issued pursuant to § 1447(c). It

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5/ Mandamus is the only potential vehicle for review and it is limited. *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589.

was.[6/] When this Court decided *Thermtron*, this subsection provided:

> If at any time before final judgment it appears that the case was removed *improvidently and without jurisdiction*, the district court shall remand the case, and may order the payment of just costs.

423 U.S. at 342, 96 S.Ct. at 589. This subsection was amended in 1988[7/] to read:

> A motion to remand the case on the basis of *any defect in removal procedure* must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court *lacks subject matter jurisdiction*, the case shall be remanded.

28 U.S.C. § 1447(c) (1988). *See Deras*, 3 F.3d at 355.[8/]

6/ The district court did not cite § 1447(c) in its order. But its failure to do so is not dispositive.

> [E]ven if the trial court neither states as grounds for remand the specific words of § 1447(c) nor cites the statute itself, the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c).

Tillman v. CSX Transp., Inc., 929 F.2d 1023, 1027 (5th Cir. 1991).

7/ P.L. 100-702, Title X, § 1016(c), 102 Stat. 4670.

8/ The district court in *Deras* followed the district court in this case and remanded the case for failure to comply with the requirements of § 1446(b). 3 F.3d at 354. As in this case, Davis and Ocean Marine sought a writ of manda-

(continued...)

Remands based on defects in removal procedure, such as untimeliness, formerly were covered under the phrase "removed improvidently." *See Royal v. State Farm Fire & Cas. Co.*, 685 F.2d 124, 127 (5th Cir. 1982). Although the words "removed improvidently" have been deleted, procedural defects remain a basis for remand under § 1447(c). The statute merely places a time limit on raising such procedural defects. Therefore, a remand based either on lack of jurisdiction or on a defect in removal procedure such as untimeliness still comes under § 1447(c).[9/] *Deras*, 3 F.3d at 355; *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 50 (3d Cir. 1993); *In re Medscope Marine Ltd.*, 972 F.2d at 109-10.

The district court here held in its original remand order that Davis had not complied with the time requirements of § 1446(b).[10/] Failure to comply with the requirements of §

8/ (...continued)
mus in the Eleventh Circuit to vacate the remand order. As in this case, the Eleventh Circuit dismissed the petition for writ of mandamus. It held that § 1447(d) precluded review of the remand order. *Id.* at 355-56. Davis and Ocean Marine have not sought a writ of certiorari on that case.

9/ This interpretation is supported by the limited legislative history of the 1988 amendment to § 1447(c). It indicates that the amendment was intended to prevent "a party who is aware of a defect in removal procedure [from] . . . hold[ing] a defect in reserve as a means of forum shopping." H.R.Rep. No. 889, 100th Cong., 2d Sess.1988, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033. *See also In re Medscope Marine Ltd.*, 972 F.2d at 109.

10/ Although the order clearly was based on a defect in removal procedure, Davis and Ocean Marine seek to avoid this conclusion by arguing that the order was not entered pursuant to § 1447(c) because Wilson had not *sought* remand on that basis. They cite no authority for the proposition that the grounds on which remand is sought is dispositive. Indeed, under *Thermtron*, review is prohibited where the remand order is *issued* under § 1447(c). 423 U.S. at 346, 96 S.Ct. at 590. Furthermore, the motion was filed within the 30-day period and was still pending at the time the district court decided on its own to remand the case on procedural grounds. *Compare* Fed.R.Civ.P. 59(d) *with Smith v.* (continued...)

1446(b) is a defect in removal procedure with the meaning of § 1447(c). *Deras*, 3 F.3d at 356; *Alleghany Corp. v. United States Dist. Ct.*, 881 F.2d 777 (9th Cir. 1989). Thus, this remand order was entered pursuant to § 1447(c). Whether or not that order was correct, it was unreviewable by the district court (on motion for reconsideration) and was unreviewable by the Eleventh Circuit (on petition for writ of mandamus) under § 1447(d).

The Convention does not alter the plain language of § 1447(d) -- "Leading the horse away from the garden path."

Davis and Ocean Marine argue that § 1447(d) does not apply to this order because the case was removed pursuant to a special removal statute -- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205 ("the Convention"). That argument fails.

In *United States v. Rice*, this Court considered a case removed under a special removal statute. 327 U.S. at 744-45, 66 S.Ct. at 836. This Court held that the limitation on review in the predecessor to § 1447(d)[11/] applied to cases removed under special removal statutes, not merely those removed under § 1441:

> [T]hese provisions [governing removal procedure and remands] were intended to be applicable not only to remand orders made in the suits removed under [the general removal statutes], *but to orders of remand made in cases removed under any other statutes as well.*

10/ (...continued)
City of Picayune, 795 F.2d 482, 484 (5th Cir. 1986)(district court has power to consider correctness of grounds for removal on its own).

11/ The limitation found in § 1447(d) has remained substantially unchanged since its enactment in 1887. *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 89.

327 U.S. at 752, 66 S.Ct. at 839. Congress did not indicate any intent to exempt cases removed under that special statute from the general remand act. *Id.* at 752-53, 66 S.Ct. at 839. Therefore, this Court found that the remand order was not reviewable by mandamus or otherwise. *Id.* at 753, 66 S.Ct. at 839.

Contrary to Petitioners' argument, *Thermtron* does not alter this holding. It does not limit the class of cases to which § 1447(d) applies based on the authority for removal. Instead, *Thermtron* simply limits the applicability of § 1447(d) based on the method by which the cases are remanded. Regardless of whether the case is removed pursuant to a special statute or a general removal statute, the § 1447(d) prohibition against review applies if the trial court purports to remand it under § 1447(c). *See* 423 U.S. at 342-46, 96 S.Ct. at 589-90. *See also Deras*, 3 F.3d at 355.

In *Thermtron*, the district court remanded the case because the court's crowded docket would delay proceeding to trial. This Court found that consideration irrelevant to the court's jurisdiction to hear the case or to the procedure by which it was removed. Thus, it was not a ground authorized by § 1447(c). This Court declined to construe the prohibition against review of remand orders in § 1447(d)

> so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on *grounds not specified in the statute and not touching the propriety of the removal*.

423 U.S. at 352, 96 S.Ct. at 593.

By contrast, the district court here remanded the case because Davis failed to comply with the time limits in § 1446(b). While the district court may have erred in doing so on those grounds, its action was not unauthorized. Therefore, *Thermtron*

does not alter *Rice* as applied to this case. Davis' reliance on the special provision of the Convention for removal does not alter the rule of nonreviewability found in the general remand statute, § 1447(d).

There is no conflict among the circuits on this issue that requires resolution by this Court -- "Clearing away the underbrush."

Contrary to Davis' and Ocean Marine's contention, the circuit courts are unanimous on this issue. This was not the first case in which a similar issue arose. As the Eleventh Circuit said in *Deras*:

> Two other circuits have addressed this issue, however, concluding that § 1447(d) precludes review of an order of remand based upon a timely § 1447(c) motion to remand for defects in removal procedure. We find these circuits' reasoning persuasive and agree that a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to § 1447(d).

3 F.3d at 355 (citations omitted).

First, Davis and Ocean Marine rely on the Eleventh Circuit's decision in *In re Fed. Sav. & Loan Ins. Corp.*, 837 F.2d 432 (11th Cir. 1988)[hereinafter *FSLIC*].[12/] They claim it "held" that § 1447(c) does not apply to cases removed pursuant to a special removal statute. *FSLIC* did not so "hold." In dicta, it summarily limited the application of § 1447(c) to cases which had been removed pursuant to § 1441(a). This apparently excluded from § 1447(c) any case removed pursuant to a special

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12/ This would not give rise to conflict among the circuits; it is the same circuit that issued the opinion here.

removal statute. *FSLIC* did not discuss *Rice*.

The Eleventh Circuit made clear in *Deras* that *FSLIC*'s cursory comments were limited to cases removed under 12 U.S.C. § 1730(k)(1), the removal provision of the FSLIC statute. 3 F.3d at 356 n.4. *See also In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 965 (11th Cir. 1989)(remand of cases removed pursuant to FSLIC statute reviewable by mandamus).

In fact, as *Deras* noted, the three other circuits which have considered this issue all criticized *FSLIC* because it appears to conflict with *Rice*. *Deras*, 3 F.3d at 356 n.4 (citing *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991); *In re Fed. Sav. & Loan Ins. Corp.*, 881 F.2d 564 (8th Cir. 1989); *Fed. Sav. & Loan Ins. Corp. v. Frumenti Dev. Corp.*, 857 F.2d 665 (9th Cir. 1988)).[13/] *Deras* has now resolved that criticism.

FSLIC cited only one case in support of the proposition that § 1447(c) is limited to cases removed under § 1441(a) -- the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). Davis and Ocean Marine also rely on *Pacor*. In *Pacor*, the court held that the general removal provisions of §§ 1441-47 did not apply to cases removed to the bankruptcy court under 28 U.S.C. § 1478 (amended and now codified as 28 U.S.C. § 1452). The Third Circuit recently discussed its *Pacor* decision and *FSLIC*'s reliance on that decision. *In re TMI Litigation*, 940 F.2d at 838-39 n.4. The court rejected *FSLIC*'s broad interpretation of *Pacor* in light of *Rice*. *Id.* It noted that its holding in *Pacor* was very narrow. Thus, even the court which authored the one case on which *FSLIC* relied disagrees with such

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13/ *Frumenti* did state that "*Thermtron* creates an exception to section 1447(d)'s general review preclusion only for remand orders that are not based on jurisdictional grounds." 857 F.2d at 670. However, as the order at issue was based on jurisdictional grounds, the court did not consider if defects in removal procedure came under *Thermtron*.

a narrow interpretation of § 1447(c).[14/]

The other cases on which Davis and Ocean Marine rely are equally inapplicable. In *Massachusetts v. V & M Mgt., Inc.*, 929 F.2d 830 (1st Cir. 1991), remand was not based on either a lack of jurisdiction or a defect in removal procedure. Thus, it was not issued pursuant to § 1447(c) and was reviewable under *Thermtron*. *Id.* at 832-33. *See also Maniar v. FDIC*, 979 F.2d 782, 784-85 (3d Cir. 1992)(*sua sponte* remand for procedural defect more than 30 days after removal violated time limits for raising procedural defects under § 1447(c) and thus was unauthorized by that statute; remand reviewable under *Thermtron*);[15/] *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989)(remand reviewable because court improperly remanded based on old version of § 1447(c); remand not authorized by current statute); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982)(remand for failure to follow local rule not based on ground authorized by §

14/ Davis and Ocean Marine attempt to argue that *TMI* supports their position because the court in that case found that it had the authority to review the remand order in question. However, the court reached that conclusion because district court had found the removal statute in question unconstitutional. The *TMI* court stated that § 1447(d) did not intend to insulate a district court's ruling on the unconstitutionality of a statute from appellate review. 940 F.2d at 843. The district court here made no such substantive ruling as a basis for the remand. *See also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991); *Clorox Co. v. United States Dist. Ct.*, 779 F.2d 517 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984)(in all these cases the court was required to make substantive rulings before remand).

15/ Davis and Ocean Marine also rely on *Maniar* to argue that the district court's original remand order was reviewable because it was based on a procedural defect not raised by Wilson and was filed more than 30 days after removal. However, unlike *Maniar*, Wilson did file a motion to remand within the 30-day period. Although the district court did not grant the motion within the 30-day period, it should be free to do so, as long as a motion was filed within the time limit. *See In re Medscope Marine Ltd.*, 972 F.2d at 109-10 (legislative history indicates § 1447(c) intended to place time limitation on filing motion to remand based on procedural defect). *Compare* Fed.R.Civ.P. 59(d).

1447(c) and thus reviewable).

Further, in *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990), the First Circuit noted a recent amendment to a relevant statute that expressly set out Congressional policy to protect federal employees by insuring their right to have actions against them determined in federal court. *Id.* at 811. The court thus found express Congressional intent to permit review of orders remanding such cases to state court. *Id.* This conclusion is fully consistent with *Rice*. However, *Rice* found no express Congressional intent in that special removal statute to permit review of remand orders. Nor is any present here.

The circuits therefore unanimously and uniformly apply *Rice* and hold that, absent specific Congressional intent to the contrary, the prohibition against review of remand orders in § 1447(d) applies where the case was removed pursuant to a special removal statute.[16/] There is no express Congressional intent to permit review of orders that remand cases removed under the Convention.[17/] Thus there is no conflict between the circuits. The petition for writ of certiorari should be denied.

16/ Davis and Ocean Marine note that Congress has since amended the removal statute at issue in *FSLIC* to expressly provide for review of remand orders in cases removed pursuant to that statute. *See* 12 U.S.C. § 1821 *et seq.* This amendment actually supports Wilson's position. If Congress intended to exclude all cases removed pursuant to special removal statutes from the provisions of § 1447(d), such an amendment would be unnecessary. Moreover, although Congress amended the FSLIC statute to provide for review of remand orders, it did not do so for the Convention.

17/ Davis and Ocean Marine claim that this Court should ignore the Eleventh Circuit's decision in *Deras* because "[i]t improperly and arbitrarily treats litigants under special removal statutes differently." Petition for Writ of Certiorari at 13 n.6. However, *Deras* merely followed this Court's mandate in *Rice* that remand orders cannot be reviewed, regardless of the basis for removal, absent express Congressional intent to the contrary.

This case was not properly removed under 9 U.S.C. § 205 -- "Arriving at the right destination without getting lost along the way."

Throughout their petition, Davis and Ocean Marine assume that the district court's first order on rehearing, which found that Davis had properly removed the case, was correct on the merits. This response would not be complete if it failed to refute that fundamentally incorrect assumption. Davis was not entitled to remove this case in the first place. To the extent the district court's order so found, it was incorrect.

Davis removed this case and cited 9 U.S.C. § 205.[18/] Ocean Marine did not remove this case; it only filed a special appearance for the limited purpose of consenting to removal. Davis claims he is entitled to remove this case under § 205 because the agreement between the two other parties, Ocean Marine and Andy/ATA (Wilson's assignor), contains an arbitration provision subject to the Convention. That position must fail for two reasons.

First, Davis is not entitled to invoke this provision. Davis, a Florida insurance agent, was not a party to the agreement between Ocean Marine and Andy/ATA. The claims against Davis, therefore, did *not* arise out of the insurance contract.

18/ 9 U.S.C. § 205 provides in pertinent part:

> Where the subject matter of an action or proceeding pending in a State court *relates to an arbitration agreement* or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. . . .

Ocean Marine and Andy/ATA are the *only* parties to the arbitration agreement. When Davis removed this case and the court remanded it, no one had sought arbitration. Thus, this Court is faced with a removal petition filed by one who is not a party to the arbitration agreement where neither party to the agreement had invoked it at that time and where the claim against the removing party does not arise out of the insurance agreement that contains the arbitration clause. No matter how one looks at it, the claims against Davis do not fall within § 205.

Second, § 205 does not authorize removal of joined claims not subject to arbitration. If a dispute is subject to arbitration under the Convention, then *that* cause of action may be removed to federal court by the defendant who is a party to the arbitration agreement at any time prior to trial. Indeed, the plain language of the statute limits what may be removed to "such action or proceeding," referring to one in which the subject matter "relates to an arbitration agreement."

The claims against Davis do not relate to an arbitration agreement. Therefore, even though the claims against Ocean Marine may arguably be subject to arbitration under the Convention and thus theoretically removable by Ocean Marine under § 205, that section does not authorize the removal of the claims against Davis which are not subject to arbitration.[19/] Davis' attempt to remove this entire case under § 205 must fail.

In *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 713 (7th Cir. 1992), the Seventh Circuit made the following observations in denying a writ of mandamus to petitioners seeking removal under § 205:

> Arbitration is supposed to be quick. Litigation about arbitration frustrates that objective. Litiga-

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19/ Wilson does not concede that his claim against Ocean Marine must be arbitrated. Wilson was not a party to the arbitration agreement. That obligation was never assigned to him.

> tion about *where to litigate* about arbitration mocks that objective.
>
> * * *
>
> It is time to get down to the merits. Wisconsin will decide the meaning of the treaties; interpretation of contracts is a staple of business in state courts. The [Petitioners] do not contend that Wisconsin disfavors arbitration or that any other doctrine or practice used there would inhibit prompt and accurate resolution of the parties' dispute. Eight months of litigation about where to litigate is plenty.

964 F.2d at 713 (emphasis by court).

This dispute also has gone on long enough. The complaint was filed two years ago and still has not been answered. The Florida state court can determine if Davis' claims can be arbitrated under the agreement, should Davis ever decide to file a motion to compel arbitration. The Florida court can also decide if it has jurisdiction over Ocean Marine. If the state court finds it has jurisdiction over Ocean Marine, Ocean Marine can try to have that court compel arbitration. There is no allegation that Davis' inability to litigate in federal court under § 205 precludes any of this. Davis simply failed to meet his burden of establishing that removal was proper. The Eleventh Circuit properly denied the petition for writ of mandamus. The petition for writ of certiorari should likewise be denied.

CONCLUSION

For the foregoing reasons, Wilson respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4639

(Filed Sept. 15, 1993)

IN RE:

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY, and MARIMAR MARINE INDUSTRIES, INC.,

Petitioners.

On Petition for Writ of Mandamus or on Petition for Writ of Prohibition to the United States District Court for the Southern District of Florida.

Before EDMONDSON, COX and CARNES, Circuit Judges.

PER CURIAM:

FACTS AND PROCEDURAL HISTORY

Ricardo Deras filed an action in Florida state court in 1989 against Ocean Marine Mutual Protection and Indemnity Association, Ltd., a British insurer ("Ocean Marine"), Robert Davis, and Marimar Marine Industries, Inc. ("Marimar"). Deras' claims against Ocean Marine are based on an insurance agreement; the claims against Davis and Marimar allege negligence for failure to obtain adequate insurance coverage. In

December 1991, Deras obtained a default judgment against Ocean Marine, which never answered his complaint. In May 1992, Marimar asserted that the case fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1/] and removed it to federal court pursuant to 9 U.S.C. § 205 (1988).

Deras then filed a timely motion to remand the case to state court. Deras contended that the action did not fall under the New York Convention and that Marimar had failed to follow proper removal procedure because all of the defendants did not join in removal as required by 28 U.S.C. § 1446(a)(1988). Davis subsequently joined in the petition for removal, and Ocean Marine filed a special appearance consenting to removal.

In March 1993, the district court granted Deras' motion to remand "for Defendants' failure to comply with § 1446(a) and (b)." (Order of Remand at 1). To support its decision, the district court cited, among other cases, *Wilson v. Ocean Marine Mut. Protection & Indem. Ass'n*, No. 92-1505-CIV-NESBITT (S.D.Fla. Aug. 4, 1992), *vacated*, Oct. 16, 1992, *reinstated*, Jan. 7, 1993 (concluding that 9 U.S.C. § 205 retains the § 1446(b) thirty-day time limit for filing notice of removal) and *Woods v. Firestone Tire & Rubber Co.*, 560 F.Supp. 588 (S.D.Fla. 1983)(holding that all defendants must join in the notice of removal).

DISCUSSION

The defendants (petitioners) seek a writ of mandamus, or alternatively a writ of prohibition, directing the district court to vacate the Order of Remand. Deras responds that, pursuant to

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1/ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted following* 9 U.S.C.A. § 201 (West Supp.1993)[hereinafter New York Convention].

28 U.S.C. § 1447(d)(1988),[2/] the district court's remand order is not reviewable on mandamus. Because we conclude that § 1447(d) precludes our review of the district court's remand order, we dismiss the petition for lack of jurisdiction.

By its terms, § 1447(d) appears to proscribe any review of remand orders. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), however, the Supreme Court held that § 1447(d) only prohibited review of remand orders issued pursuant to 28 U.S.C. § 1447(c). When *Thermtron* was decided, § 1447(c) provided for remand of cases that had been removed "improvidently and without jurisdiction." 423 U.S. at 342, 96 S.Ct. at 589. Remands based on considerations outside § 1447(c), *e.g.*, a crowded docket, were an exception to § 1447(d) and remained subject to review on mandamus. *Id.* at 344-45, 96 S.Ct. at 590.

In 1988, Congress amended § 1447(c) to read:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

28 U.S.C. § 1447(c) (1988). While it was generally accepted that cases remanded for lack of subject matter jurisdiction

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2/ 28 U.S.C. § 1447(d)(1988) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

This case was not removed pursuant to § 1443, which provides for the removal of civil rights cases.

remained immune from review after the 1988 amendment, *see, e.g., Harris v. Blue Cross/Blue Shield of Ala.*, 951 F.2d 325, 326-27 (11th Cir.1992), the status of cases remanded for defects in removal procedure was less certain. *See McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 (5th Cir.1991). The reviewability of a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is an issue of first impression in this circuit.

Two other circuits have addressed this issue, however, concluding that § 1447(d) precludes review of an order of remand based upon a timely § 1447(c) motion to remand for defects in removal procedure. *In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir.1992); *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 50 (3d Cir.1993); *see also Creekmore v. Food Lion, Inc.*, 797 F.Supp. 505 (E.D.Va.1992). We find these circuits' reasoning persuasive and agree that a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to § 1447(d).[3/]

In this case the district court remanded the action after Deras filed a timely motion alleging inapplicability of the New York Convention and defects in the removal procedure employed by the defendants. The court premised its decision on the defendants' failure to comply with § 1446(a) and (b), citing cases which held that all defendants must join the notice of removal under § 1446(a) within thirty days of the time when the case becomes removable under § 1446(b). The procedural requirements of § 1446(a) and (b) are generally applicable to a removal under the New York Convention, because 9 U.S.C. §

3/ It may be that an order of remand based on an *untimely* motion to remand for defects in removal procedure is reviewable on mandamus. *See In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir.1991), *cert. denied*, --- U.S. ---, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir.1989). Because Deras' motion was timely, we need not address the reviewability of a remand order based on an untimely motion to remand for defects in removal procedure.

205 provides that "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." *See In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir.1992). Failure to comply with § 1446(a) and (b) constitutes a defect in removal procedure within the meaning of § 1447(c). *See Wilson v. General Motors Corp.*, 888 F.2d 779, 781 n. 1 (11th Cir.1989).

The district court's remand order is based upon a timely § 1447(c) motion to remand for defects in removal procedure.[4/] Therefore the remand order, "whether erroneous or not," is not subject to review in this court pursuant to § 1447(d). *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589. Because the district court's order is not subject to review, we do not reach the question of the applicability of the New York Convention to Deras' state court action or the question of defendants' joinder; we state no opinion as to the correctness of the district court's conclusion that 9 U.S.C. § 205 retains the thirty-day time limit of § 1446(b) for the same reason.

The defendants' application for a writ of mandamus, or alternatively a writ of prohibition, is dismissed for lack of jurisdiction.

4/ We have previously stated that "[s]ection 1447(c)'s application is . . . limited to cases removed from state court pursuant to section 1441(a)." *In re Federal Sav. & Loan Ins. Corp.*, 837 F.2d 432, 436 (11th Cir.1988). We made this statement in a case removed under 12 U.S.C. § 1730(k)(1) (1988), which authorizes the FSLIC to remove to federal court when acting as the receiver of a federal savings and loan association; it is dictum as to cases removed under other statutes. Moreover, our statement has been criticized as conflicting with the Supreme Court's decision in *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). *See In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838-39 n. 4 (3d Cir.1991), *cert. denied*, --- U.S. ---, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992); *Federal Sav. & Loan Ins. Corp v. Frumenti Dev. Corp.*, 857 F.2d 665 (9th Cir.1988).